In the Supreme Court of the United States

OCTOBER TERM, 1925
NUMBER 665

THE VILLAGE OF EUCLID, OHIO, and HARRY W. STEIN, Inspector of Buildings for the Village of Euclid,

Appellants,

vs.

THE AMBLER REALTY COMPANY,

Appellee.

On Appeal from the District Court of the United States For the Northern District of Ohio.

MOTION, BRIEF AND ARGUMENT AMICUS CURIAE

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MOTION

Now come American Wood Products Company, Northwestern Feed Company, Lyle Culvert & Road Equipment Company, corporations of the State of Minnesota, and T. Benson, by George T. Simpson, their Counsel, and respectfully move the Court for an order, granting them leave to file herein the appended Brief *amicus curiae.* upon the grounds as appears in said brief.

GEORGE T. SIMPSON
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MOTION, BRIEF AND ARGUMENT AMICUS CURIAE

STATEMENT

The importance, legal and otherwise, of the questions involved in this litigation, the far-reaching effect, either way, of the decision of this Court in the above entitled matter, both legal and economic, upon the affairs, of at least, at present, *many* of the great cities of the Nation; and, if the power to "zone" be declared constitutional, the certain extension of "blanket" or "comprehensive" zoning to the many villages of the Nation; and finally the pendency of similar litigation in the District Court of the United

States, Fourth Division, for the District of Minnesota, affecting the City of Minneapolis, the decision of which pending litigation will be influenced, and, perhaps, entirely controlled, by the opinion in the cause at bar, constitute the grounds of this application. Further, it may be said that its purpose is to aid the Court toward a more comprehensive view of the general situation which we believe confronts this Nation, growing out of the attempt by persons, not always actuated by unselfish motives, to import this principle of "comprehensive zoning" into the affairs of its cities and villages.

The claims of the plaintiff, in the Court below, are rightfully, many, but in the end the claim of the Ambler Realty Company is contained in the statement that the "zoning" of its property by the Village of Euclid constitutes a "taking" of its property to an extent that amounts to confiscation without compensation.

We believe that a like situation exists, wherever, in this Nation, an attempt has been made to "comprehensively" zone municipal property. In some instances this "zoning" or "taking" is more vicious than in others; and property values thereby are more completely obliterated than in others, depending, sometimes, in part, upon the general makeup of the body imposing the restrictions, and again, sometimes, in part, upon the ignorance, selfishness, and ofttimes, dishonesty, of the members thereof; yet, in the end, the result is the same, for wherever it is situate, and by whomever zoning is imposed, *property* is always "taken" without compensation.

The attention of the Court, at the outset, is respectfully called to the history, present developments, and its underlying causes which apparently obtain

in the City of Cleveland, on the one hand, and to the same history development and causes in the Northwest, with particular reference to the Cities of Minneapolis and St. Paul, Minnesota, on the other hand.

In the case at bar the record shows that the City of Cleveland was founded in 1796 on a small area at the mouth of Cuyahogo River, and with but a few inhabitants; but that with the coming of the railroads there also came a large population and, particularly, a great industrial development which latter, naturally, followed the located rail lines, each being inter-dependent upon the other. That a part of this development ultimately spread to what is the Village of Euclid, now part of Greater Cleveland, and to a tract of land therein containing about sixty-eight acres and owned by the appellee. That this tract of land is served by the Nickel Plate Railroad which, in part, at least, is responsible for the availability, and value, of this land for industrial purposes. That for such purposes this land is reasonably worth from $8,000 to $10,000 per acre, or from $564,000 to $680,000 for the entire tract, while for residential purposes the land involved is not worth more than $2,000 to $3,000 an acre, or from $136,000 to $204,000 for the entire tract. That on this tract of land, so situate, and so conditioned, the Village Council of the Village of Euclid imposed an ordinance providing, in effect, that this land might be used in part only for industrial purposes.

The history of the present development of the cities of St. Paul and Minneapolis is much the same. These cities are approximately, seventy-five years of age. That is to say, seventy-five years ago, where now stand the Twin Cities, with their million of in-

habitants, was vacant prairie. The Government of the United States had then built Fort Snelling and there were a few huts on the present site of St. Paul, but they were inhabited only by Indians and a few whites. At the Falls of St. Anthony (now Minneapolis) a like settlement existed. There were no industries and no property values. Railroads had not yet been built and the only means of transportation were the ox cart and steamboat, in the summertime, and, the dog sled in the winter.

The assessed valuation of the real property situated in the City of Minneapolis, upon a basis of forty per cent of its real value, in 1925, was $249,109,685, and the assessed valuation of the same in the City of St. Paul, upon a same basis, in 1925 was $139,249,498. The value of the output of the industries of the City of Minneapolis for the year 1923 was approximately $491,382,000, and the value of the output of the industries of the City of St. Paul, for the same year, was approximately $149,638,000. Further these Twin Cities are distributing points for Northern Minnesota, the States of North and South Dakota, and particularly, the State of Montana, an empire in itself, of which only the surface has been scratched; and it may fairly be said that the development of these Twin Cities will continue unless arbitrarily stopped, until this vast territory, tributary to them, has become settled.

There are, probably, many factors which have brought about the result indicated above, but the agency which has contributed, mostly, to this is the railroads which center in the Twin Cities. They are chiefly, the Northern Pacific, Great Northern, Chicago, Milwaukee & St. Paul, Rock Island and Pacific, Minneapolis and St. Louis, Chicago Great

Western, Chicago & Northwestern, Chicago, Burlington & Quincy and the Minneapolis, St. Paul and Saulte St. Marie. These railroads serve as a means of communication between these cities and the entire Northwest, including the Dominion of Canada, and over their lines there is brought into these Twin Cities the products of the farms and forests of the Northwest in exchange for the merchandise, also likewise distributed, which is the product of the factories and industries, situate therein.

With this short statement, it is, perhaps a trite observation, that the welfare of the agricultural Northwest, the welfare of the railroads of the Northwest, and the welfare of the industries of the Twin Cities are closely inter-dependent.

In 1871, what is now the Chicago, Milwaukee & St. Paul, but then known as the St. Paul and Chicago, built into the City of Minneapolis, from the City of LaCrosse, Wisconsin, and shortly, thereafter, within the confines of the City of Minneapolis, constructed a line of railroad, on land to which it then owned, and still owns the fee, along the southeasterly bank of the Mississippi River, connecting the lines of the Milwaukee with the lines of the Great Northern; and, thereafter, and, for many years, prior to the attempt to impose a zoning restriction on property in the City of Minneapolis, an industrial situation, encouraged by the City of Minneapolis, grew up along the line of this railroad; thereupon many persons bought land, located themselves adjacent to this line of railroad, connected their respective industries with it by sidetracks, received their raw material, and shipped their finished products out over it, not only, to and from points in the State of Minnesota, but, also to and from points in other

states, the aggregate number of cars using this line in intra and interstate commerce at the time of the attempt of the City of Minneapolis, in 1924, to impose a "comprehensive" zoning ordinance, designating this property, *including the right-of-way* of this railroad as *"residential"* exceeding six thousand cars per month. The total value, in 1925, for industrial purposes, of the property so affected, and situate on this railroad, exceeded, in all probability, $5,000,000.

This industrial development is adjacent to a like industrial development in the City of St. Paul; is likewise near to and connected with, the property of the Minnesota Transfer Railway Company, a combination of the nine railroads above mentioned; and is, also, served by three arterial highways in the cities of St. Paul and Minneapolis, all affording an easy, convenient, and economical access to, and from these plants.

On the 3rd day of April, 1924, the City Council of the City of Minneapolis adopted a so-called Zoning Ordinance covering the entire city, designating the property above mentioned, actually including the right-of-way referred to, as "residential"—and prohibiting the erection, of any new or additional industry, and the remodeling, enlarging or repairing of existing industries or of any commercial enterprise upon the property so designated.

> Zoning Ordinance of the City of Minneapolis, pp. 527-572 City Charter and Ordinances of Minneapolis (1926 Ed.) by Arthur C. Pulling.

That the property involved could not be used for residential purposes, apparently, was not taken into account, or if noticed, was given no consideration, be-

cause of other reasons; nor, apparently, was any consideration given to the great loss that was sure to follow the enactment and enforcement of this ordinance.

The foregoing statement of fact is made, not with an intention of presenting to the Court the zoning situation in the Cities of St. Paul and Minneapolis, in and of itself, but because the facts, as already suggested, in the above entitled case are strikingly similar to the facts as they exist in these cities. In each case a blanket zoning ordinance was enacted; the character of the property is much the same; and the uses to which the respective tracts best may be put are analogous. While the case at bar, and the situation in the City of Minneapolis, it may be claimed, are aggravated instances of the abuse to which "zoning" may be put in the hands of incompetent or unscrupulous, persons, yet, we believe, we are on entirely safe ground when we assert that, not only, in these instances, but *always*, even if the last mentioned conditions do not exist, the imposition of a "blanket" zoning ordinance at best is fraught with great loss and damage to the property interest involved. The reasons for this are manifest and, while, perhaps, they need not be discussed here, yet, no harm will come from saying, that, the millenium has not yet arrived; and selfishness has not been taken out of the human heart; but that whatever may be the reason, the effect is the same.

To put the matter in legal phrase, the enactment of these zoning ordinances constitute, always, we contend, a violation of most of the applicable principles of the Constitution of the United States; or, other-

wise stated, the persons asking leave to file this brief, respectfully contend that the adoption of a "blanket" *zoning* ordinance by a municipality of the United States,

> Must, necessarily, deprive the owners of their property without due process of law, contrary to Article Five and Article Fourteen of the Constitution of the United States; and
>
> Must, necessarily, deprive such owners of property of the equal protection of the law, contrary to Article Five and Article Fourteen of the Constitution of the United States; and
>
> Is, **always**, so unreasonable as to constitute a "taking" of the property of such persons for a public purpose without just compensation, contrary to Articles Five of the Constitution of the United States.

ARGUMENT

At the outset of the discussion, it may be helpful to define "property" in the terms used by this Court:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."
>
> Buchanan v. Warley, 245 U. S. 74.

And other Courts have well said:

> "The right to acquire property, to own it, to deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to constitutions. It existed before them. Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387. It is however, a right guaranteed by our constitutions. It is a right necessary to the exist-

ence of organized society. The protection of this natural right is one of the reasons which prompted man to form governments. The protection of private property is the aim of every well considered form of government. The right of private property has been called the keystone of the arch of civilization. A government which fails to protect the right of private property cannot endure. Men will not undergo the labor and hardships necessary to the acquisition of property if they find that the ownership and enjoyment thereof is not to be protected. With the right of ownership and possession goes the right to use, enjoy and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a prescription of its ownership."

Ignaciunas vs. Risley, 121 Atl. Rep. 783.

The foregoing, undoubtedly, states the legal conception of *property* held, not only today, by most of us, but, also held, at the time of the adoption of the Constitution of the United States, by the men who framed it. Yet, the constitution did not formulate a new idea concerning property. It only put in written form the conception of property which was our heritage from the ages.

"Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former."

Webster's Works, 392

"The bill of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land, but if the prohibition had been omitted a legislative enactment to pass one man's property over to another would,

> nevertheless be void * * * The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power. * * * The parliment of Great Britian indeed as possessing the sovereignty of the country has the power to disregard fundamental principles and pass arbitrary and unjust enactments, but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution from which its authority springs or on which it depends and by which the courts can test the validity of its declared will. The rules which confine the discretion of parliment within the ancient landmarks are rules for the construction of the powers of the American Legislature." Cooley Constitutional Limitations, 7th. Ed. 244-245.

Coming to us then—from Magna Charta, and the common law, is *our* conception of property, and the rights which flow from its acquisition, not only "to own it and use it as the owner chooses so long as the use harms nobody," but, also, to rest secure therein. And it may be well observed, in passing, that this sense of security, that heretofore has generally come with the acquisition of property, under Anglo-Saxon institutions, has ofttimes, been just as valuable to the owner thereof, as has been the property actually acpuired.

This conception of property, and the rights which flow from it, and its possession, and, which guarantee its enjoyment, is as already suggested, particularly Anglo-Saxon in its character. True, other races own, and have owned property, and such other races, due to their history, and their environment, have had, and now have, differing ideas respecting its sanctity, its protection in the owner, and, the right of the sovereign power

to take it from him; with their various systems we have no quarrel here. But, it goes without saying, that it is *Anglo-Saxon conception of property* and *Anglo-Saxon* conception of the *right* of the *owner* to *own, use, and enjoy* his or her property which is under consideration at this time.

With the foregoing conception of the rights of private property in mind, the Fathers of the Nation, and those who followed in their footsteps, framed the Constitution of the United States, so as to provide as follows, so far as here material:

"ARTICLE V.

"No person shall * * * be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

"ARTICLE XIV.

"No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

It is not proposed here, to attempt, to call to the attention of the Court, the many decisions of this Court bearing upon, and interpreting, these provisions of the Constitution. Perhaps, no good would be accomplished thereby. The Court is familiar with its own decisions. In saying this, it is not to be assumed that we are forgetful that certain phases of the controversy, more, or less, distantly related to the question under discussion, here, have been passed upon by this tribunal. But, we feel confident in saying that the question, as to whether or not, a *blanket* or *comprehensive zoning* ordinance, such as that adopted by the Village Council of the village

of Euclid, in the case at bar, and by the City Council of the City of Minneapolis, and following in their wake, using these ordinances as a model, those "blanket" zoning ordinances which undoubtedly, have been adopted, by many cities and villages, throughout the Nation, constitute a constitutional exercise of power, by these municipalities, is now before this court for the first time.

The question for determination here, then, is this:

Is the ordinance adopted by the Village Council of the Village of Euclid, within the inhibitions of the Constitution of the United States, to which reference has just been made?

Do ordinances, such as the one under consideration in the case at bar, "deprive" or "take" private property for a public purpose, "without compensation?"

If they so do "take" or "deprive" the owner of his property, is such "taking," nevertheless, in accordance with the law of the land and under such ordiances, is an ower of property so "taken" accorded equal protection of the law?

Concisely,—is "blanket" or "comprehensive" zoning constitutional?

ZONING

The Courts have said that the enactment of a zoning ordinance, and other similar ordinances, under color of authority, while outstanding, create a substantial cloud upon the title of the property, and that the only adequate relief is a decree ascertaining and declaring their invalidity and cancelling the cloud.

Ambler Realty Co. vs. Village of Euclid 297 Fed. 307.
Ex Parte Young, 209 U. S. 123.
Kennington vs. Palmer, 255 U. S. 100.
U. S. vs. Swartz, 255 U. S. 102.
Willard vs. Palmer, 255 U. S. 106.
Adams vs. Tanner, 255 U. S. 590.
Truax vs. Raich, 239 U. S. 33.
Block vs. Hirsh, 256 U. S. 135.
Brown Holding Co. vs. Feldman, 256 U. S. 170.

On the other hand, "zoning" has sometimes been called "City Planning." But, among the more ardent of its devotees, "zoning" has been defined as follows:

> "Zoning is regulation under the police power of the state. Police power is now exercised in the regulation of nuisances, the maintenance of building and housing codes, the establishment of conditions required for sanitation and fire prevention; and the enforcement of other ordinances deemed necessary for the promotion and preservation of the public health, safety, order, convenience, morals, prosperity and general welfare."
>
> "Zoning is an extension of this police power to regulate the use of all real property in the city so as to prohibit unsuitable and injurious uses of land or structures; to protect each owner from obnoxious noises, odors, gases and sights and the impairment of his just portion of light, air, and useable street area and to prevent the despoilation of property or the depreciation of values in established districts by the encroachment of improper uses."
>
> Harlan Bartholomew - Report to Planning Commission City of Minneapolis.

It is this statement of what "zoning" is, what it purports to accomplish in the affairs of mankind, and particularly the means that it intends to employ, unless prevented by the courts, that more nearly expresses what "zoning" means to those who are now

trying for many reasons, we believe, to have the judgment appealed from herein reversed.

Perhaps, originally, "City Planning" in a general way was intended, but now the word "zoning" has come to have an entirely different connotation, and is generally understood to mean the "taking" of private property, under the guise or cover of the police power, without compensation, and for a purpose, deemed by some Board, assuming that they act honestly, for what it claims is the public welfare. That, in truth and in fact, it is sometimes the private welfare, of a board member, or of someone connected with the Board, will not be seriously denied by those conversant with the facts.

It is not proposed to review here the conditions which exist in most of the cities of America, yet the incompetency and dishonesty, which by reason of many factors, dominate their affairs, is known to us all. What is desired at this point is to suggest, simply to the Court that the same persons, now in control of these affairs of these cities, are the same persons who would have control of "zoning," with all its temptations, if it is permitted by law; and to suggest, further, that if private property may be taken for the purposes above indicated, but, only, *with compensation paid,* which means a reflection of the amount, so expended, in the tax bill of the community, then the temptation to take private property, *without compensation,* for the purpose of some board member, or of some "cult," or favored few in the community, with its consequent hardship, and loss, to the owner of the property, is removed and the safeguards of the Constitution of the United States are retained.

"The statute in question is aimed in the wrong direction, and not in promotion of the general welfare, as that term for many years has been understood and applied by the courts. The intelligent thought of the day notes with some concern the increasing unrest and discontent with the trend of our civil affairs, prevalent among the people not only of state and nation, but the world over. Yet that same intelligence, apparently without thought or reflection, at the same time demands the enactment and enforcement of laws, the only tendency of which is to add to and accentuate in a measure conditions made the basis of such discontent—legislation, like the statute here involved, which in effect segregates the people into classes founded on invidious distinctions, extending to one thereof by positive law the powerful eminent domain arm of the State, by which one class may, on aesthetic or fanciful grounds, exclude from their selected neighborhood members of the other classes, and thus deprive them arbitrily of the free enjoyment of their property, although they may be of equal intelligence and moral standing with those thus temporarily vested with the use of that powerful state weapon. Heretofore the people in this country have been permitted to work out their own social relations unaided by direct legislation. And those who are willing to take cognizance for the moment of the history of civil governments and of the reason for the downfall of many of them cannot but be impressed that the general welfare will best be promoted by a continuance of that method of regulating matters of that kind. * * * The statute which is sustained is but a straw indicating a drifting from constitutional moorings toward class distinctions created and fostered by law." Brown C. J. and Dibell J. (dissenting) State exrel Twin City B. & I. Co. vs. Houghton, 144 Minn. 1, 23.

That a statute of the State of Minnesota, involving an exercise of the power of eminent domain, was under consideration in the foregoing case, is not material here. The philosophy, of this dissenting opinion, is equally applicable to the question here under discussion.

POLICE POWER.

The police power of the state has been defined as follows:

> "The due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."
>
> 4 Blackstone Comm. 162

> "The police power of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens, with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."
>
> Cooleys Constitutional Limitations, 7th Ed. p. 828.

Nakedly, then, the question here is this: Does the exercise of the police power, contitutionally, permit of "blanket" or "comprehensive" zoning, and, the "taking" of private property, thereunder, for either, or all, of the purposes above indicated?

It is elementary that the police power is among those powers not delegated by, nor prohibited to the states, and is, therefore, among the powers reserved to the states or to the people. While this is true, it is equally well settled that its exercise, is nevertheless, subject to the inhibitions of the Constitution, and, that under the cloak of the police power, those inhibitions may not be flouted and rendered nugatory.

The legislature must not, under the guise of police regulation, arbitrarily, invade private property of personal rights. The test is found in the answer to the question whether the regulations have some real and substantial relation to the public health, safety or welfare, and, particularly, whether that is the end sought..

In re Jacobs 98 New York, 98
50 Am. Rep., 636
Calif. Reduction Co. vs. Sanitary
Reduction Works, 156 Fed. 26
(affirmed 199 U. S. 306).
People vs. Murphy, 129 App. Div. 260.
113 N. Y. Supp. 855.

While this phase of the matter is fully presented in the brief for the appellee, yet no harm will arise from, again, suggesting to the Court, that, if, it does not clearly appear that the public safety, health, or welfare is subserved by the imposition, by the Village of Euclid, of the ordinance in question upon the property of the Ambler Realty Company, and particularly, if the public safety, health, or welfare is not the end sought thereby, then the judgment of the court below is to be affirmed; and further that it is, indeed, difficult to comprehend how the public health, safety or welfare will be subserved

by the removal of manufacturing plants already existing, and the denial of the right to erect new plants situate in close proximity to a great Transcontinental railroad, with the multitudinous traffic that continually flows over its rails, and by the erection of *homes in their* stead. The contrary would seem to be the fact.

Cases additional to those above noted appear upon page 24 of this brief.

The police power deals with the conventions of society, with the changeable things of government, public health, the morals of the people, public peace and the public welfare, all of which change, sometimes, from day to day ofttimes from year to year, and always from decade to decade. Sometimes these changes come of their own force, the transition extending over a long period of time, sometimes by statute, with a short period of discussion, and sometimes, over night and while the army is in Europe. What was considered a virtue a hundred years ago is a crime today. There is, and there can be, of necessity, no fixed rule of determination. In regard to these matters, the lawmaker and the administrator, where these functions are involved, are adrift upon a sea of emotion, in which the conscience of the public, or the shifting winds of public opinion is ofttimes their only guide. The whole idea of the police power and its administration is its adaptabil, ity, both as to substance and form, to the ever-changing, so-called, "conventions" of mankind. Yet, it is this principle of government, *uncertain*, and at all times *shifting*, that the proponents of "comprehensive zoning" desire to apply to *real property, its uses and enjoyment*.

That the Constitution was intended, among other things, to *protect property and property rights, to* make *certain and sure* to the owners of property, the right to have and enjoy it, deal with it, as he sees fit, so long as he injures no one else, and, in the end, to transmit it in accordance with his desire, is not material to the mind of the enthusiastic "comprehensive" zoner. He would put that all away—all that makes for *certainty and security,* and, would substitute, in its stead, the everchanging, shifting application of the police power. The system of "comprehensive zoning," in effect thus, proposes to take away from the owner of property the right to determine for *himself* the use to which *his property* shall be put, and, in lieu thereof, to put it to a use, determined by someone else, who is *not the owner;* and when the owner has thus been deprived of the use of his property, "comprehensive zoning" further contemplates that the thus designated use shall not be changed, or in such cases where a change is permitted that such change shall then be dependent, as in the case of the Minneapolis ordinance, upon the consent of the surrounding property owners; or, as in the case at bar, upon the whim, or good-will, of the council, or other designated body.

As the learned trial judge in the case at bar points out, in his order directing the entry of judgment in favor of the plaintiff in the Court below, this system of "comprehensive" zoning places a "straight-jacket" on the property involved and thus effectually "takes," in a constitutional sense, the property and its use, from the owner for a public purpose but *without* compensation.

To say that the inhibitions of the Constitution

are not thus flouted, and, are not rendered nugatory by any of these so-called systems of "comprehensive" zoning, we respectfully suggest, is to deny not only the letter, but the spirit of the Constitution.

> "If this charter of State government, which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests; the precepts that have come to us from the revolutions which overturn tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so.—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit; that which gives it force and attraction, which makes it valuable and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give,—this living and breathing spirit which supplies the interpretation of the words of the written charter would be utterly lost and gone."
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> People v. Hurlbut, 24 Mich. 44, 107.

But there is another, and, perhaps, more cogent reason why this ordinance should be declared in-

valid, as within the inhibitions of the Constitution.

As this Court has said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The constitution protects these essential attributes of property. Property consists of the **free** use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."
>
> Buchanan v. Warley, Supra.

To put the matters in another way, the right to acquire property, to own it, deal with, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right, and, as before pointed out, this right existed long before the writing of the Constitution and the latter only confirmed it.

Yet, these zoning ordinances, assuming to interfere with this natural right, through the medium of some Council, or other designated body, delegate, of necessity, to such body *absolute* authority to determine what shall be the uses to which property shall be put. The use of the property thus depends upon the discretion, whim, or caprice of the designated body.

That this power, necessarily, one of the attributes of "zoning" is inconsistent with our Anglo-Saxon ideas of property, and the right to use and enjoy it no person of Anglo-Saxon heritage, at least, ought to deny. It is not a situation where the owner of property is using it to the harm of someone else. It is rather a situation where the owner of property

is using it, as he has a right to use it, until someone else wants to use it, as the latter person thinks, or, in some instances, pretends, or claims, to think it should be used.

The Court will readily sense some of the evils which would flow from this abuse of property rights. One common example will suffice;—Councilmen, by whatever name designated, come and go; the original ordinance may designate property as "residential;" in the course of a few years conditions change, and the best interests of the property will then demand that it be made "commercial," or, perhaps, "light" or "heavy" industrial; yet, the surrounding property owners, or some member of the designated body, to whom has been given power to decree the change of designation, then may have some alleged, or, at best, selfish, reason for opposing the change, and so defeat it; or if it more nearly suits the ultimate end in view, perhaps, will then grant the desired change to one person, but deny it to others similarily situate.

That this is not a fanciful picture a mere casual investigation of any zoning enterprise will demonstrate; but, that it results in a "taking" of property in one instance, without compensation, and, a denial of "equal protection" in the other, no one will deny. However, that such procedure takes away from the owner of property dominion over his own, over that which he has created, or, has lawfully inherited, and places such dominion at the caprice, or whim, of the designated body, made up of persons, ofttimes, not noted for their creative ability, at least, in the realm of property, all will admit.

> "The ordinance is wholly silent as to this, and but one inference can be drawn, which is that the city council may exercise its own discretion, judicial or capricious in the premises, and allow a permit to one and not to another under exactly the same conditions. There is no moral test prescribed, nor any rule of action or standard fixed by which the applicant may be controlled or governed, in order to qualify him as a suitable person to be allowed the permit. It is obvious that the ordinance is deficient in this respect, and accords to the city council arbitrary power respecting the plaintiff's property rights, and is therefore a nullity, in view of the Fourteenth Amendment to the Constitution."
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> Heerdt v. City of Portland, Oregon, 8 f. (2nd) 871,872.

It is most apparent that if this Court upholds the right of a municipal corporation, thus to limit arbitrarily the right of land owners to erect, enlarge, remodel or repair structures on their lands, that then the progress and growth of industry will be made to depend upon the political ambitions of the respective members of the designated bodies; and that under such power, they could curb, restrict, or, even destroy any, or all, industry in one section of a city to the advantage of competing industries in another section of the same city.

The rights of property guaranteed to an owner by the Consitutions, can not be made light of, and, the subject of playful pastime, by legislatures, or bartered away under the guise of a police regulation.

Ex Part Sing Le, 96 Calif. 354, 24 L. R. A. 95
Hayes vs. Poplar Bluff, 263 Mo. 516, 173, S. W. 676.
Cory v. Atlanta, 143 Ga. 192, 83 S. E. 456.
People v. Chicago, 261 Ill. 16, 103 N. E. 609.
Yick Woo v. Hopkins, 118 U. S. 356, 30 L. Ed. 22
Village of Terrace Park et al v. Errett 12 123 (2nd) 240.
Investment Co v. McKelvey et al 256 S. W. 474, - 489 and 495
Cooper Lumber Co. v. Dammers, 125 Atl. 325.
Church v. Newcomb, 108 Nebr. 859, 189 N. W. 617.
Willerup v. Village of Hempstead, 199 N. Y. S. 56.
Isenbarth v. Bartnett, 201 N. Y. S. 383
Jersey Land Co. v. Scott, 126 Atl. 173.
Goldman v. Crowther, 128 Atl. 50.

It is respectfully urged therefore that for the reasons given "comprehensive zoning," or "blanket zoning," deprives the owners of their property without due process of law, contrary to Article Five and Article Fourteen of the Constitution of the United States, and of the equal protection of the law, contrary to Article Five and Article Fourteen of the Constitution of the United States; and is always so unreasonable a "taking" of property for a public purpose without compensation, as to render it contrary to Article Five of the Constitution of the United States; and in all things is contrary to, and violative of, the law of the land; and that for these reasons, the judgment of the Court below should be affirmed.

But in addition to what has just been said, there is another phase to this question of "comprehensive"

or "blanket" zoning, which, we believe, merits the attention of the Court.

The economic situation in the Northwest, and, perhaps, with isolated exceptions, throughout the Nation, is not of the best. And while it may not be a constitutional argument yet it is, respectfully, urged that "comprehensive" zoning does not help this situation, but rather adds to it and makes it more acute.

The manufacturer and transportation are closely inter-dependent. The success of one is the success of both, and the prosperity of these two, spell, in large letters, **prosperity** for the entire Nation. If the manufacturer cannot sell his product and if he cannot transport his product to market, his prosperity, is terminated; and, if transportation is unable to obtain freight, its prosperity is diminished by just so much.

So far as now appears, every attempt to inflict upon a municipality, a scheme of "comprehensive" zoning, has always had as its result, either the entire removal of factories from property adjacent to transportation facilities; or a denial of the right to extend factories already existing, or a denial of the right to construct new factories. Indeed, it is, perhaps, not going too far to say that gauged by the manifestations of its activity, the whole effect of "comprehensive" zoning has been to drive industry, away from its established seats in the cities, and to other locations, where a new home must be established, and that, too, regardless of the loss, and damage, which always occurs, in connection with an arbitary change in industrial conditions.

Sometimes this has been accomplished with an altruistic purpose in view, but more often the only available trackage, outside of that "zoned" is held by the members of the designating body, or their friends; and, the property, the use of which has been interfered with, has been so "zoned" with the sole interest, and purpose, of driving the owners therefrom and to the property of the friends of the designating body.

It will not do to say that where industry is thus interfered with, industry will find another place and carry on. Common experience is against such a claim. Money is timid, and if it cannot see protection in industry, it will retire from industry and will find investment in other lines—all with a consequent destruction to the markets of the manufacturer and transportation.

That this destruction of the markets of the manufacturer and the revenues of transportation constitutes a "taking" of the property of these factors of prosperity, no one will deny, and if the effect of "comprehensive" zoning is, thus to interfere with, and perhaps wipe out, these factors, and we earnestly contend that such has been, and will be, its effect, then *comprehensive* zoning should be denied.

CONCLUSIONS.

In conclusion, it is respectfully urged, upon the Court, that the theory of *"blanket" or comprehensive" zoning,* under the *police power* is foreign to the principles of constitutional government, as understood and practiced, for a century and a half in the United States of America. Under the American view, government is considered to be one of law and not of men, but these so-called Zoning Ordinances are attempts to reverse the rule by which we American people have heretofore been guided, and are, apparently, attempts to import into this country the European view that government is one of men and not of law. It is only of late years that this loose theory as to the rights of property. and its enjoyment, and right of government to take property, without paying for it, has had any alleged legal vogue in the United States. There are other theories of government, akin to the theory under which it is claimed these so-called Zoning Ordinances are valid, which of late have crept into the law of the United States, constitutional and otherwise, and which are now somewhat reflected therein; but it is a fair statement, in the plight in which this nation finds itself today because of those laws, that, in the same degree that we forget the ideas which surrounded the original enactment of the Constitution of the United States, and follow after these theories, and strange gods, of Europe, we breed for the Nation trouble, and, perhaps, disaster. The right of the individual to use and enjoy his property, as he will, and the right to conduct himself as he sees fit,

so long as he does not intrude upon the rights of someone else, has made this Nation great; and, the sooner we forget the ideas typified by these so-called Zoning Ordinances the better it will be for this Nation, and all the people who live in it.

It is earnestly suggested that in the interest of all persons the judgment appealed from should be affirmed.

Respectfully submitted,

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